IN THE

Supreme Court
OF THE UNITED STATES

OCTOBER TERM—1946

No. 1002

D. M. W. CONTRACTING CO., INC., HARTFORD ACCIDENT AND INDEMNITY COMPANY AND AETNA CASUALTY AND SURETY CO.,

Petitioners,

—*vs.*—

C. R. STOLZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

EMANUEL HARRIS,
Counsel for Petitioners.

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Petition.

The petition of D. M. W. Contracting Co., Inc., Hartford Accident and Indemnity Company and Aetna Casualty and Surety Co. respectfully shows to this Court:

This is a petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia.

On December 9, 1946, said Court of Appeals affirmed a judgment entered in the United States District Court for the District of Columbia on December 19, 1945 in favor of respondent against petitioners in the sum of $9,654.28 with interest from August 1, 1941, and costs, including the expenses of a reference in the sum of $750, and dismissed a counterclaim against respondent (Rec. 119, 96, 97).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended (Act of February 13, 1925, Chapter 229, as amended; U. S. C. A. 28 § 347(a)).

Statement of Matters Involved.

(Figures in parentheses refer to pages of the record).

Petitioner D. M. W. Contracting Co., Inc. (hereafter referred to as "D. M. W.") was the general contractor for the construction of the East Building, Municipal Center, Washington, D. C., under a contract with the District of Columbia (3, 115). Petitioners Hartford Accident and Indemnity Company and Aetna Casualty & Surety Company were the sureties for D. M. W. on its contract (3, 115). Respondent Stolz was the assignee of Premier Granite Quarries, Inc., a sub-contractor of D. M. W. for the furnishing of materials in the construction of the building (2).

The action was originally commenced by D. M. W. against the District of Columbia for the balance due on the general contract (115). Respondent Stolz intervened in the action, asserting a claim against D. M. W. in the sum of $9,939.29 for materials furnished (2). D. M. W. denied liability on Stolz' claim and asserted a counterclaim against Stolz (5).

On April 25, 1944, the District Court denied motions by D. M. W. and the District of Columbia for summary judgment, and without objection by any of the parties, referred the cause to the Auditor of the Court (A. Leftwich Sinclair) to take testimony upon the issues raised by the pleadings, to make findings of fact and conclusions of law and to report to the Court (12).

Subsequent to the reference, D. M. W. and the District of Columbia settled, leaving in litigation only the claim of Stolz against petitioners (115).

The auditor conducted hearings on October 17, 18, and 19, 1944 (91). David M. Woolin, president of D. M. W., who was the only person familiar with the facts relating

to the contract between D. M. W. and Stolz, was then ill, recuperating from a heart attack (13, 91). An affidavit by a New York physician certifying that Woolin was suffering from coronary thrombosis and was not in physical condition to appear in Washington and stating that it would be unsafe for Woolin to testify under any circumstances for a period of six months was, at the suggestion of the Auditor, filed with him (13, 91). Stolz' counsel verified by direct telephone to Woolin that he was unable to testify (91).

The Auditor suggested that the hearing proceed as far as possible without Woolin (91) and at the conclusion of the hearing, on October 19, 1944, and upon request for postponement until Woolin had recovered sufficiently to testify, the Auditor adjourned the case (91).

On December 18, 1944, at a hearing set by the Auditor, an affidavit of a Florida physician was submitted certifying that Woolin was suffering from coronary thrombosis and that it would be dangerous for him to leave Florida for six months (14). A further affidavit of the New York physician as to Woolin's condition was submitted on December 27, 1944, stating that it was necessary that Woolin be under the constant supervision of a physician and that he have absolute quiet and rest (15).

On January 19, 1945, Stolz moved in the District Court to recall the case from reference to the Auditor, and to advance the cause and fix a date for final hearing, or in the alternative, to require the Auditor to conduct a final hearing, to speed the proceedings and to file his report by a day certain, giving as reasons for such motion that the cause was originally referred by the order of April 18, 1944 at a time when there were complicated issues between the original plaintiff and defendant, which had been removed by settlement, and that there was no necessity for the case being continued before the Auditor, and that

D. M. W. and its sureties hindered, delayed, and obstructed the determination of the cause (16). Attached to the motion were the affidavit of a New York attorney to the effect that he had gone to Woolin's office on October 19, 1944 and had been told that Woolin was out most of the time and that Woolin was better and taking care of his business (17-18), and the affidavits of private investigators that on January 10 and 13, 1945 they had gone to Woolin's residence in Florida and had seen Woolin driving his car, mixing paints, and that Woolin appeared in good health (17-22, 23-25).

Upon said motion and the affidavits in support thereof and in opposition thereto, the District Court entered an order on February 1, 1945, without objection by petitioners thereto as to the form thereof, directing petitioners to comply with Rule 10 of the District Court by filing a sworn statement of the material testimony proposed by Woolin on or before February 15, 1945, or in the alternative, that Woolin appear and testify on or before said date, and further directing that the Auditor speed the proceeding, conclude the hearing and file a draft report with counsel on or before March 1, 1945 under Rule 53 of the Florida Rules of Civil Procedure (23). At the same time, the District Court Judge directed Stolz' counsel, if he were not satisfied with Woolin's sworn statement, to propound interrogatories to Woolin (92).

On February 6, 1945, the District Court modified the above order by striking out the direction as to the filing of the draft report by March 1, 1945, and directing that the Auditor speedily conclude and give to the cause such preference and priority of attention and action as the other business of his office would warrant and justify (26).

On February 15, 1945, at the hearing set by the Auditor, petitioners filed with the Auditor Woolin's sworn statement, thus complying with Rule 10 of the District Court

and the order of the Court (92). Stolz' counsel stated that he would go through the statement and indicate what he would agree Woolin would testify to, and what he would object to, that he could agree on the matter and then submit it to the Auditor for consideration (93). The Auditor indicated that if Stolz refused to stipulate to what Woolin would testify, he would either give consideration in his report to the facts stated in Woolin's affidavit as evidence, or at least he would consider the affidavit of Woolin as grounds for granting a continuance and a granting of a reasonable time to petitioners to submit evidence (90).

The Auditor then adjourned the hearing to February 21, 1945 to permit Stolz' counsel to examine Woolin's statement (93). At the hearing on February 21, 1945, Stolz' counsel reversed his position and refused to stipulate to any part of Woolin's statement on the ground that certain parts of it were not admissible, and also refused to proceed by interrogatories (93).

The Auditor then requested both parties to file briefs on the questions as to whether any of the facts stated in Woolin's affidavit might be considered as evidence by the Auditor, and as to whether, as an alternative, the affidavit was sufficient for the granting of a continuance by the Auditor for the purpose of permitting either side to submit additional evidence (90).

Such briefs were submitted to the Auditor (90, 27). The Auditor died before ruling thereon (90, 27). Fred J. Eden then became the Auditor of the District Court. There was no re-reference of the case to him. The new Auditor filed a request for instructions with the District Court, stating that he felt that he should not proceed without a stipulation that the case be submitted on the basis of the existing record, or in the absence of instructions by the Court. He stated that the parties could not

so stipulate and he requested instructions from the Court on whether petitioners were entitled to a further continuance based on Woolin's affidavit, whether the hearings should be deemed concluded, and whether the Auditor should be required to file his report, together with proposed findings and conclusions based upon the existing record (27-28).

Petitioners opposed these requests in open Court, contending that since the previous auditor had died before making any conclusion of fact or law and before filing a report, the reference terminated and that the successor Auditor was without authority to make findings of fact and conclusions of law based upon the testimony heard by the previous Auditor.

At this stage of the case, the only evidence which had been submitted was the evidence offered by Stolz. No evidence had been submitted by petitioners. The affidavit of Woolin submitted pursuant to Rule 10 of the District Court and the order of the District Court of February 1, 1945, had been filed, Stolz had refused to stipulate to any of the facts contained in the affidavit and had refused to proceed by interrogatories, and there had been no ruling by the Auditor as to whether, in view of such refusal to stipulate, a continuance should be granted.

Rule 10 of the District Court provides as follows:

> "(c) Absent Witness: Ground of Motion (for Continuance). When the motion to postpone a trial is granted upon the absence of a witness, the affidavit shall set forth the material matter to which it is expected the witness will testify. If the adverse party admits that the witness would so testify the Court may deny the motion, making a note of the admission for use at the trial."

On August 24, 1945, in response to the successor Auditor's request for instructions, the District Court, over the objection of petitioners (116) entered an order denying petitioners' request for a further continuance; directing that the hearings be deemed concluded and directing the Auditor to file his report with his findings of fact and conclusions of law based upon the existing record of testimony taken and exhibits introduced at the hearings before the deceased Auditor of the Court (28-29). Petitioners excepted to said order (29).

On November 2, 1945, the new Auditor filed his report setting forth the various orders of the Court, referring to the testimony and exhibits introduced before the previous Auditor (39) making various findings of fact and conclusions of law to the effect that Stolz was entitled to recover the sum of $9,654.28 with interest from August 1, 1941, from the petitioners, dismissing the counterclaim against Stolz and stating that there was a charge of $750 for the services rendered and expenses incurred under the reference (75).

On November 20, 1945, Petitioners filed exceptions to the report of the Auditor, reserving the right to move to suppress the report on the ground that the Auditor was without jurisdiction to make a report based on testimony taken before the former Auditor (76); excepting to various specific findings (76); excepting to the failure to give the affidavit of Woolin any consideration (87, 90); excepting to the conclusions of law (88-89) and excepting to every part of the report on the ground that it was totally ex-parte; that the former Auditor who had presided over and heard all the evidence died before rendering a report, and that the intervenor (Stolz) was required by law to try the case de novo upon the death of the previous Auditor (90, 93). The exceptions to the report also set forth the facts as to the proceedings before the previous

Auditor with reference to Woolin's illness and the submission of the affidavit as to his proposed testimony (90-93).

Simultaneously with the filing of exceptions to the report, petitioners filed a motion to suppress the report on the ground that the Auditor who presided over and heard the evidence died before rendering a report; that the new Auditor was without jurisdiction; that by reason of the death of the previous Auditor, a trial de novo was required; that the report filed by the new Auditor was totally ex parte; that the Auditor failed and refused to give any consideration to the affidavit of Woolin and that the case should be reopened and petitioners should be given a reasonable opportunity to present evidence (94-96).

On Dec. 19, 1945, the District Court entered final judgment on the report of the Auditor, reciting that petitioners had had every reasonable opportunity to produce competent evidence and had failed to do so; overruling the motion to suppress the report and the exceptions thereto; adopting the report of the Auditor as the findings of fact and the conclusions of the Court; granting judgment to Stolz, against petitioners for the sum of $9,654.28, with interest from Aug. 1, 1941 and costs, including the expenses of the reference in the sum of $750, and dismissing the counterclaim (96-97).

On December 9, 1946, the United States Court of Appeals for the District of Columbia affirmed the judgment of the District Court (119).

The Court of Appeals held that under Rule 53 (e) of the Federal Rules of Civil Procedure, it was not error for the District Court to direct the successor auditor, over petitioners' objection, to base his findings and report upon the evidence taken by his deceased predecessor. It held that under said Rule, the report of the master (Auditor) is only advisory; that final determination of all the issues

rests with the Court, notwithstanding the provision of the Rule that the master's findings of fact shall be accepted by the Court, unless clearly erroneous; that the transcript of the evidence is before the Court for review; that it is not necessary to have the master who makes the findings hear the testimony and take the evidence and that his report should be given the same effect as the report of a master before whom the entire proceedings took place. The Court also held that the Trial Court in its review of the transcript of the proceedings and evidence determined for itself whether the master should receive further evidence and held that petitioners "were given every reasonable opportunity all through the trial below to produce competent evidence but failed to do so" and that Woolin's failure to appear was due to an unwillingness to testify rather than to an inability. The Court further held that when the master's hearings are completed and the master dies before his report is made, the parties ought not to be put to the unnecessary expense of resubmitting their evidence (115-118).

Questions Presented.

1. Did the death of the first Auditor terminate the reference so that petitioners became entitled to a trial de novo?

2. Was the Court authorized to direct the Successor Auditor to make findings and conclusions on testimony taken before his deceased predecessor?

3. Does the law require that a Master who makes findings of fact and conclusions of law hear the testimony and take the evidence on which his findings and conclusions are to be made?

4. Under Sec. 16-1718 of the Code for the District of Columbia, which provides that if a referee shall die before making his award the court shall, *upon the consent of the parties,* appoint a referee, was the Court authorized, over the objection of petitioners, after the death of the first auditor, to refer the cause to the successor auditor?

5. Under Rule 53 (b) of the Federal Rules of Civil Procedure, which provides that reference to a master shall be the exception and not the rule, and that in non-jury actions, a reference shall be made only upon a showing that some exceptional condition requires it, was the Court authorized to re-refer the cause to the successor Auditor, over the objection of petitioners, in view of the fact that respondent had moved to recall the reference on the ground that there were no complicated issues and no necessity for the case being continued before the Auditor?

6. Under Rule 10 of the Rules of the United States District Court for the District of Columbia, which provides for the denial of a continuance upon the admission of an adverse party that an absent witness would testify as stated in an affidavit of his proposed testimony, and the adverse party refused to so stipulate, was the Court authorized to deny the continuance and close the hearing without giving petitioners any further opportunity to submit evidence?

7. Was such denial, followed by the entry of judgment on the ex parte report of the successor master based solely on the evidence submitted by respondent, a denial of due process of law under the Fifth Amendment?

8. Is the provision in Rule 53 (e) (2) of the Federal Rules of Civil Procedure that the Court shall accept the Master's findings of fact unless clearly erroneous modified

by the subsequent provision in said subparagraph that the Court may modify or reject the Master's report in whole or in part?

9. Was the Court authorized to enter judgment against petitioners for the expenses of the reference to which they objected, and which was in violation of Sec. 16-1718 of the Code for the District of Columbia, Rule 10 of the Rules of the District Court, the Fifth Amendment and Rule 53 of the Federal Rules of Civil Procedure?

Reasons Relied On for Allowance of Writ.

1. The United States Court of Appeals for the District of Columbia has erroneously decided the following questions of law of general importance which have not been and should be settled by this Court:

a. Upon the death of an Auditor to whom a cause has been referred to take testimony, make findings of fact and conclusions of law and report to the Court, the reference terminates and the parties are entitled to a trial de novo and the Court may not appoint a successor Auditor over the objection of a party, to make findings and conclusions upon the testimony taken before the deceased Auditor.

b. It is necessary that a Master who makes findings of fact and conclusions of law hear the testimony and take the evidence on which such findings and conclusions are based.

2. The United States Court of Appeals for the District of Columbia has erroneously decided the following propositions of law which are of substance relating to the construction and application of statutes of the United States which have not been and should be settled by this Court.

a. Under Sec. 16-1718 of the Code for the District of Columbia, which provides that if any referee shall die before making his award, the Court shall, upon the consent of the parties or their counsel, appoint a referee, the Court may not appoint a referee over the objection of a party.

b. Under Rule 10 of the Rules of the United States District Court for the District of Columbia, providing for the filing of an affidavit as to the proposed testimony of an absent witness, and the denial of a continuance of trial, upon the admission of an adverse party that that witness would so testify, on the refusal of the adverse party to stipulate to such testimony, the Court may not deny the continuance and refuse a further opportunity to submit evidence.

c. The provisions of Rule 53 (b) of the Federal Rules of Civil Procedure that a reference to a Master shall be the exception and not the rule and that a reference shall be made only upon a showing that some exceptional condition requires it, applies to a re-reference after the death of a Master, and the Court may not order such a re-reference over the objection of a party, where the adverse party admits that no exceptional condition requires it.

d. The provision of Rule 53 (e) (2) of the Federal Rules of Civil Procedure that the Court shall accept the Master's findings of fact unless clearly erroneous is not modified by the subsequent provision in said sub-paragraph that the Court may modify or reject the Master's report in whole or in part.

3. The United States Court of Appeals for the District of Columbia has erroneously decided the following questions of substance relating to the application of the Constitution of the United States, which have not been and should be settled by this Court.

a. The appointment of a referee upon a re-reference after the death of a prior referee over the objection of a party and notwithstanding the provisions of Sec. 16-1718 of the Code for the District of Columbia that such appointment shall be made upon consent of the parties or their counsel, deprives the objecting party of his property without due process of law under the Fifth Amendment to the Constitution.

b. The denial of a continuance under Rule 10 of the Rules of the United States District Court for the District of Columbia, upon the refusal of an adverse party to stipulate as to the testimony of an absent witness, and the closing of testimony without further opportunity to submit evidence, deprives a party of his property without due process of law under the Fifth Amendment to the Constitution.

c. The entry of judgment upon an ex parte report of a master, based on evidence submitted only by one party and without a reasonable opportunity to the adverse party to submit evidence, deprives the adverse party of his property without due process of law under the Fifth Amendment to the constitution.

Petitioners therefore pray that a writ of certiorari may be allowed to review the order of said United States Court of Appeals for the District of Columbia and that a writ

may issue to said Court directing that all the proceedings may be forwarded to this Court for review.

Dated, New York, N. Y.,
February 6, 1947.

D. M. W. Contracting Co. Inc.,
Hartford Accident and Indemnity Company, and
Aetna Casualty and Surety Co.
By:
Emanuel Harris
Counsel for Petitioners.

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D. M. W. CONTRACTING CO., INC., HARTFORD ACCIDENT AND INDEMNITY COMPANY AND AETNA CASUALTY AND SURETY CO.,

Petitioners,

—*vs.*—

C. R. STOLZ,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I(a).

The death of the first auditor terminated the reference so that the petitioners became entitled to a trial *de novo* and the Court was without authority to direct the successor auditor to make findings of fact and conclusions of law upon the testimony taken and the exhibits introduced before the deceased auditor.

In *People* v. *Lewe*, 50 N. E. (2d) 577, 383 Ill. 549, on a petition of mandamus to require a judge to proceed with the hearing and disposition of a cause upon testimony taken and certified to by a master in chancery, to whom a cause had been re-referred subsequent to the death of the original Master, where a Master died before the proofs were closed, it was held that the only permissible reference

was to a new master to take evidence and report his conclusions. The Court said (p. 581):

> "Respondent was warranted in concluding that the reference was wrong in two respects, first, as an error of commission in directing Master Bryant to consider the evidence taken by Master Dunn, and second, as an error of omission, in not directing him to take *all* the evidence and report his conclusions of law and fact."

In *Coel* v. *Gross*, 83 N. E. 529, 232 Ill. 142, where the term of a master in chancery expired after the taking of the testimony but before the report was made and the Court then referred the cause to another master to consider the evidence already taken in making up his report as to the facts and the law, and the second master examined and considered such evidence, although none of it was taken before him, and from such consideration made a report of his conclusions as to the facts and the law, the court said (p. 530):

> "The court, however, erred in referring the case to Edward B. Eacher, the second master in chancery, for the purpose of having him report his conclusions of fact and law upon the evidence which was not taken before him, and erred in overruling exceptions of the defendants and such order of reference to the report under it. While a master in chancery before whom a cause is heard may consider depositions taken by virtue of a dedimus potestatem in connection with the evidence produced before him, it is not the function of a master, as a ministerial officer, to hear cases and decide issues upon evidence taken before another master. The parties are entitled to have the master who is to form his conclusions as to the facts, hear the testimony of witnesses. When the term of office

> of Edward A. Dicker as master in chancery expired, all proceedings before him as such master came to an end, and the court was without authority to again refer the case to another master in chancery to report his conclusions as to the issues by reading the testimony taken before Dicker."

So in *Kenealy* v. *Glos,* 89 N. E. 289, 293; 241 Ill. 15, where a cause was referred to a master after some evidence had been taken by the Court, it was said (p. 293):

> "If the reference had been made before any evidence was taken, the proper practice would have been for the parties to submit all of their evidence before the master; but since the Court had already heard a part of the testimony before the reference was made, the reference was only for the purpose of taking and reporting the evidence that had not previously been heard by the Court. *If the reference had been for the purpose of taking the evidence and reporting his conclusions thereon, it would, no doubt, have become necessary for the Master to retake that part of the evidence that had been heard by the court.*"

In *Devlin* v. *Mayor,* 9 Daly 335 (N. Y.) it was held that the effect of the death of a referee before the termination of the reference is that "nothing has been accomplished and that a new referee must be appointed before whom the trial of the cause has to be begun again."

In *Berls* v. *Metropolitan El. R. Co.,* 15 N. Y. Supp. 155, where an action was referred to three referees by order on stipulation and one died after all testimony was taken, and after briefs and findings were submitted but before determination, it was held that the death *ipso facto,* vacated and terminated the reference.

In *Emmet* v. *Bowers*, 23 How. Pr. (N. Y.) 300, where two of three referees to whom an action was referred died, and the cause was undecided, it was held to be a matter of course that the order of reference be vacated.

The reference in this case to the auditor "to take testimony upon the issues raised by the pleadings, to make findings of fact and conclusions of law and to report to this Court" (Rec. 38) constituted the auditor, in effect, a judge for the purposes specified in the order of reference.

In *U. S.* v. *United Surety Co.*, 226 Fed. 985 (D. C. Calif.) it was held that a reference to take the evidence and to report findings of fact and conclusions of law, constituted the referee a judge, *pro hac vice*, with power as ample for the conduct of the trial and rulings on all questions arising therein, excepting only for entry of judgment, as if the cause were being tried by the court itself.

The death of a judge, prior to termination of a trial or a decision terminates the proceedings as though no trial had been had so that the parties become entitled to a new trial *de novo*.

This Court has held that even after judgment, where a judge dies before signing a bill of exceptions on appeal, a new trial should be granted.

Hume v. *Bowie*, 148 U. S. 245, 253, *Malony* v. *Adsit*, 175 U. S. 281, 286.

The Court below cited the cases of *Frank Adam Electric Co.* v. *Colt's Patent Fire Arms Mfg. Co.*, 148 (F.) (2d) 497 (C. C. A. 8) and *O'Grady* v. *Chatauqua Builders Supply Co.*, 33 F. 2d 957 (D. C. New York) as supporting its holding that it was not necessary to have the master who makes the findings hear the testimony and take the evidence and that his report should be given the same effect as the report of a Master before whom the entire proceeding took place (Rec. 117).

In the *Adam Electric Co.* case, a patent infringement suit was involved. It was tried before a judge who died after the evidence had been taken but before the case was argued. *The parties then stipulated that the case be referred to a Special Master for decision on the record made before the judge who tried the case.*

It was proper, therefore, for the Court to hold in that case that it was bound by the findings of the Master.

In the *O'Grady* case, the parties stipulated to a reference to a referee in bankruptcy as a Special Master, to hear, try and determine the issues as to a preferential transfer. The referee died after taking the testimony and hearing arguments but before rendering decision. Subsequently, on motion a hearing *de novo* on the testimony already taken and the exhibits was had before the Court. It does not appear that there was any objection to this procedure. The court held that there was no irregularity in thus taking over the hearing.

The Court below also cited the cases of *In re Mifflin Chemical Corporation,* 123 F. 2d, 311 (C. C. A. 3) and *In re Philpott,* 37 F. Supp. 43 (D. C. W. Va.) on its holding that the report of the Master was advisory only and without effect until confirmed by the Court. In the *Mifflin* case, a bankruptcy referee sitting as a special master recommended the disallowance of a claim after the Trustees were given full opportunity to be heard and the trustees stated that they would not offer any testimony and made no attempt or request to do so until after the cases were decided adversely by the District Court.

In the *Philpott* case, on the report of the bankruptcy referee sitting as a special master on the petition of a bankrupt for discharge, the court held that Rule 53 (e) (2) of the Federal Rules of Civil Procedure with respect to the effect to be given to the findings of a Special Master was applicable and the findings were sustained because.

as the Court stated, *the Special Master had an opportunity to see and hear the witnesses.* In that case, the bankrupt excepted to the action of the referee in refusing to permit him to offer further evidence upon the re-reference by the court. The exception was overruled because the re-reference was for the sole purpose of having the referee make his findings more specific and the Court noted that the nature or materiality of the new evidence proposed to be submitted by the bankrupt did not appear.

I (b).

The provision in Rule 53(e)(2) of the Federal Rules of Civil Procedure with reference to the effect to be given to a master's findings of fact is not modified by the provision that the Court may modify or reject the report.

The Court below held that under Rule 53 (e) (2) the direction to the Successor Auditor to base his findings and report upon the evidence taken by his deceased predecessor was authorized notwithstanding the provision, that the Master's findings of fact shall be accepted by the Court unless clearly erroneous, under the further provision in the same subparagraph that the Court was authorized to adopt the report, modify it or reject it in whole or in part (Rec. 116-117).

Rule 53 (e) (2) provides as follows:

> "In Non-Jury Actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous . . . The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

The construction given to the above rule by the Court below is contrary to all the authorities as to the effect to be given to the Master's findings of fact. In none of such authorities has it been held that the authority given to the court to modify or reject a Master's report includes the rejection of findings not clearly erroneous and the binding effect of such findings extends to appellate courts as well as to trial courts.

In *Morris Plan Industrial Bank* v. *Henderson*, 131 F. (2d) 975 (C. C. A. 2) the Court held that the Appellate Court must also accept the referee's findings and the Court said (p. 976):

> "Everyone forms his conclusions from testimony, not only from the words which he hears the witness utter but from their appearance when they utter them, and the added weight to be attached to a referee's finding, or to a judge's (if he sees the witness) depends upon the fact that he has in effect had evidence before him which cold print could not preserve. So far, therefore, as the words themselves leave any latitude, the referee's conclusion ought to prevail because we cannot appraise the cogency of the lost evidence. In the end, as we have said, the responsibility for the right conclusion remains the judge's as indeed it does ours. In re Kearney, 116 F. (2d) 898; but we have again and again held that except in plain cases he should accept the referee's findings * * * We therefore hold that the question is the same in this court as in the district court."

II.

The re-reference to the second auditor over the objection of Petitioners was in violation of Section 16-1718 of the Code for the District of Columbia.

Section 16-1718 of the District of Columbia Code provides as follows:

> "Death of Referee. If any referee shall die before making his award the court shall, upon the consent of the parties or their counsel, appoint a referee who shall have the same power to act as if originally appointed by mutual consent of the parties. (Mar. 3, 1901, 31 Stat. 1256, Ch. 854, Sec. 429.)"

Rule 53 of the Federal Rules of Civil Procedure makes no provision for a re-reference upon the death of a Master. The provisions of the Code for the District of Columbia therefore continue to control in such circumstances. *Shima* v. *Brown*, 133 F. (2d) 48, 77 U. S. App. D. C. 115, Cert. Den. 318 U. S. 787.

The Petitioners objected to the re-reference to the Successor Auditor (Rec. 28-29). The Court was therefore without power to re-refer the case. The Court below gave no consideration in its opinion to Petitioners' contention that the provisions of the District of Columbia Code governed the situation.

III.

The re-reference to the second auditor was contrary to the provisions of Rule 53(b) of the Federal Rules of Civil Procedure.

Prior to the death of the First Auditor and on January 19, 1945, the Respondent moved in the District Court to recall the case from reference to the Auditor on the ground that, when the cause was originally referred, it contained complicated issues between the original plaintiff and the defendant, which had been removed by settlement and that there was no longer any necessity for the case being continued before the Auditor (16). At that time, testimony had been taken before the first Auditor and the subject of consideration before the Court on the Respondent's motion was the matter of continuance of the hearing by reason of the absence of the Petitioners' witness and the submission of an affidavit as to what such witness would testify (23). There was no exceptional condition requiring a reference at the time the District Court directed the reference to the second Auditor (27-28).

Rule 53(b) provides:

> "A reference to a Master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it."

In *McCullough* v. *Cosgrave,* 309 U. S. 634, 635, this Court, in a per curiam opinion citing Rule 53(b), directed that an order of reference be vacated. The facts upon which the decision of this Court was made do not appear

in the per curiam opinion but reference thereto was made in the case of *Adventures in Good Eating* v. *Best Places to Eat*, 131 F. (2d) 809 (C. C. A. 7th), where that Court, referring to the *McCullough* case, said (p. 814):

> "* * * The per curiam opinion is short, but an examination of the records of the Supreme Court shows that the order of reference was made because of the asserted illness of the District Judge. It also appeared that all parties desired an early hearing and the case had been pending for a long time. Moreover, the calendar was congested, and no other judge was available to try the case within a reasonable time.
>
> "The foregoing factual situation was conceded, and a reference was ordered. The Supreme Court, however, directed the judge to vacate the order of reference, citing Rule 53(b). The case presented a fact situation which supplied a stronger basis for reference than the one before us."

In the *Adventure in Good Eating* v. *Best Places to Eat* case, supra, which involved a copyright infringement suit, the defendants objected to a reference, and the Court said (p. 814):

> "Our first question is as to the propriety of this reference. Rule 53(b) governs. The District Court seems to labor under the inference that the words 'exception' and 'exceptional' as used in this rule, are elastic terms, with it the sole judge of their elasticity. Such a construction we can not accept.
>
> "From our study of the record before us, we are unable to find any exceptional conditions such as the rule (Rule 53(b) of the Rules of Civil Procedure) contem-

plated as a prerequisite to a reference. In fact, the opposite appears. We are convinced that a case which required but a few hours' oral testimony should have been heard by the trial court instead of being referred to a Master and heard piecemeal, on five different occasions, over a period of three months.

"Litigants are entitled to a trial by the court, in every suit, save where exceptional circumstances are shown. It is a matter of common knowledge that references greatly increase the cost of litigation and delay and postpone the end of litigation. References are expensive and time-consuming. The delay in some instances is unbelievably long. Likewise, the increase in cost is heavy. For nearly a century litigants and members of the bar have been crying against this avoidable burden of costs and this inexcusable delay. Likewise, the litigants prefer, and are entitled to, the decision of the judge of the court before whom the suit is brought. Greater confidence in the outcome of the contest and more respect for the judgment of the court arise when the trial is by the judge.

"We are convinced that the defendant's objection to the reference should have been sustained. The case is a clear one against reference. The plaintiff having asked for a reference, and the court having granted it on plaintiff's motion, the costs of such reference should be charged to the plaintiff. It was not the Master's fault that he was called to hear the controversy. He performed his duty. It was the court's error, provoked by the plaintiff's motion that brought about the reference.

"The decree is modified by directing that the costs of reference in the sum of $715.50 shall be paid by the plaintiff and not charged against the defendants."

In the case of *Los Angeles Brush Corp.* v. *James,* 272 U. S. 701, cited by this Court in the *McCullough* case, *supra,* this Court considered a reference ordered under Equity Rule 59, which contained a provision similar to Rule 53(b), that a reference to a Master shall be the exception, not the rule, and shall be made only upon a showing that some exceptional condition required it. In that case, this Court sustained the reference upon a showing of congestion in the district calendar, including criminal cases, and that civil litigation other than patent cases had not been accorded a fair proportion of the time of the Court. But this Court indicated that district judges would be advised that this Court deemed the rule with respect to references important and that this Court intended to make them effective.

In *Webster Eisenlohr, Inc.* v. *Kalarner,* 145 F. (2d) 316 (C. C. A. 3), Cert. Den., 325 U. S. 867 the Court said:

"Rule 53 is explicit in its statement that 'A reference to a master shall be the exception and not the rule.' And that in actions to be tried without a jury, 'a reference shall be made only upon a showing that some exceptional condition requires it.' It is clear, we think, that a master is appointed only to help the Court in a case where the help is needed. His appointment and activities are only for the purpose of assisting the Court to get at the facts and arrive at a correct result in a complicated piece of litigation pending before the Court. The master operates as an arm of the Court. Surely he has no wider scope of activity than the Court itself."

In *Hartford Empire Co.* v. *Shawkee Mfg. Co.*, 4 F. R. D. 474 (D. C. Penn.), it was held, under Rule 53(b), that the fact that the trial lists were heavy and the hearing would be burdensome on the court, was not an "exceptional condition" contemplated by the rule and an application for the appointment of a master was denied.

In *Joyce, Inc.* v. *Fern Shoe Co.*, 32 Fed. Supp. 401, 404 (D. C. Calif.), it was held that the use of masters should be discountenanced except in cases of emergency and *when the request comes from the litigants.*

In Re Irving-Austin Bldg. Corp., 100 F. (2d) 574, (C. C. A. 7), the Court said (p. 577):

> "References should seldom be made, and if at all, only when unusual circumstances exist. A fraud issue, ordinarily, is not a proper one for reference to a special master. Perhaps it would be better to say,—issues in fraud hearings are not the proper subject for reference to a special master, save in extraordinary or exceptional cases. And exceptional means the rare—the unusual case or circumstances. The rule is more than an academic pronouncement. It demands application."

The Court referred to the provision in Rule 53(b) and said (p. 577):

> "References to masters are attended by dangerous and unhappy consequences, even when, as here, care is exercised in the selection of the master. These possible results should be avoided."

In *Coyner* v. *U. S.*, 103 F. (2d) 629 (C. C. A. 7), the Court indicated that if timely objection to the reference had been made, it would have considered the question of the discretion of the trial judge in ordering a reference, and said (p. 635):

"We do believe it is far better practice, except where stress of work or other good cause is shown, for the Court to try cases where the determination of the issues is dependent upon the credibility of the witnesses."

In *Barnard-Curtiss Co.* v. *Maehl,* 117 F. (2d) 7 (C. C. A. 9), the Court sustained the denial of a motion for a reference, where the pleadings did not disclose complicated issues.

In *Helfer* v. *Corona Products,* 127 F. (2d) 612 (C. C. A. 8), in an action by a sales agent for an accounting of commissions and breach of contract, the district court referred the whole case to a master to take the testimony and to report findings of fact and conclusions of law. The master died after taking the testimony and before making his report and a second master was appointed as a "master in succession." He considered the pleadings, the transcript of testimony and exhibits and made a report, to which plaintiff excepted. The district court, on consideration of the report, the plaintiffs' exceptions, the transcribed testimony and the exhibits, entered a decree dismissing the case. Plaintiff appealed. The Court said (p. 614):

"At the outset we take occasion to point out that although the plaintiff's petition prayed for the appointment of a master in this case, there was no showing that any exceptional condition required such appointment for the whole case within the intendment of Rule 53, Federal Rules of Civil Procedure, 28 U. S. C. A., following Section 723c. A reference to a master shall be the exception and not the rule; and where, as in this case, nothing more was involved in the suit than to ascertain and adjudicate how much, if anything, this small defendant company owed its sales agent in respect to the contract it had with him, and where all the testimony was taken in less than four days of

hearings, the duty of trying and deciding the case and of filing the findings of fact and conclusions of law supporting the decree was upon the court."

The Court indicated (p. 615) that but for the fact that plaintiff was without means and was proceeding *in forma pauperis* and urged that it review the decree, the Court would have reversed the decree and remanded the case to the direction of the district court to supply such findings and conclusions.

IV.

The closing of the hearing upon the testimony taken before the first auditor, without an opportunity to Petitioners to submit evidence, was in violation of Rule 10 of the Rules of the District Court.

Rule 10 of the Rules of the United States District Court for the District of Columbia provides as follows:

> "(c) Absent Witness. Ground of Motion (for Continuance). When the motion to postpone a trial is granted upon the absence of a witness, the affidavit shall set forth the material matter to which it is expected the witness will testify. If the adverse party admits that the witness would so testify the Court may deny the motion, making a note of the admission for use at the trial."

The affidavit as to the testimony to be given by Petitioners' witness was filed by Petitioner in accordance with the above rule and the order of the District Court made thereon on February 1, 1945 (Rec. 23, 92). As shown in the statement in the accompanying petition, notwithstanding the refusal of Respondent's counsel to stipulate to any part

of the affidavit of Petitioners' witness and Respondents' refusal to proceed by interrogatories, as directed by the Court, the Court closed the hearing on the testimony as already given, denied the application of Petitioners for a continuance and directed the Successor Auditor to make findings and conclusions upon the then existing record. This was clearly in violation of Rule 10 of the District Court.

The Court below stated in its opinion that the case was continued from time to time until the Respondent showed to the Court's satisfaction that the Petitioners' witness' failure to appear was due to an unwillingness to testify rather than to an inability, whereupon, the Court ordered the Auditor to conclude the cause (Rec. 116).

The controversy as to the inability of Petitioners' witness to testify *preceded* the order of February 1, 1945, which provided for the filing of the affidavit in accordance with Rule 10 and a direction to Respondent's counsel if he was not satisfied with the affidavit to propound interrogatories.

Subsequent to said order there was no submission to the Court of any affidavits as to the illness of the Petitioners' witness. Without further submission of any facts and without change of any circumstances subsequent to the order of February 1, 1945, the District Court closed the hearing upon the testimony already taken and denied the continuance.

The statement of the Court below, therefore, that the conclusion of the hearing was after Respondent showed to the Court's satisfaction that Petitioners' witness was unwilling to testify and likewise the statement in the third footnote in the opinion of the Court below, that Petitioners were given every reasonable opportunity to produce competent evidence but failed to do so, was contrary to the record (Rec. 116, 117).

The proceedings disclose that no effect was given to Rule 10 of the District Court and the proceedings taken deprived the petitioners of the benefit of such rule, promulgated to protect a litigant whose witnesses are unable through illness to appear and testify.

V.

The Petitioners were deprived of their property without due process of law in violation of the Fifth amendment to the Constitution.

The entry of judgment against Petitioners and the affirmance thereof by the Court below resulted from the rereference to this Successor Auditor upon the death of the First Auditor, over the objection of Petitioners, the direction that the Successor should make findings and conclusions upon the testimony taken before his deceased predecessor, the violation of the provisions of Section 16-1718 of the Code of the District of Columbia with reference to the requirement of the consent of the parties to the appointment of a Successor Referee, the denial of the protection and benefit extended by Rule 10 of the Rules of the District Court in the case of absent witnesses, and the violation of the provisions of Rule 53(b) of the Federal Rules of Civil Practice, that reference to a Master shall be made only upon a showing that some exceptional condition requires it and the entry of judgment upon the *ex parte* report of the Successor Auditor based solely on the evidence submitted by the Respondent.

In *Ochoa* v. *Hernandez*, 230 U. S. 139, 161, the Court said:

> "Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and

giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

In *Anderson National Bank* v. *Luckett*, 321 U. S. 233, 246, the Court said:

"What is due process in a procedure affecting property interests must be determined by taking into account the purposes of the procedure and its effect upon the rights asserted and all other circumstances which render the proceeding appropriate to the nature of the case. (Citing cases.) The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. If that is preserved, the demands of due process are fulfilled."

"The absolute fundamentals of due process are jurisdiction, adequate notice and a fair hearing. What constitutes due process in any given situation may also depend upon the particular procedural provisions of applicable statutes." (*U. S.* v. *Certain Parcels of Land*, 40 F. Supp. 436, 441 D. C. Md.)

"The basic requisites of due process when applied to judicial proceedings are that, having due regard to the form and nature of the proceeding and the character of the rights which may be affected, the order, judgment or decree be entered by a court clothed with jurisdiction of the subject matter and that the party or parties bound by it have notice and be afforded an opportunity to present every available defense." (*Kansas* v. *Occidental Life Ins. Co.*, 95 F. 2d 935, 937 (C. C. A. 10.)

"A proceeding strictly ex parte with no later opportunity to set aside an improper judgment is not due process or law and would offend the constitutional provision." (*Hèsse* v. *Ledesma*, 7 Porto Rico Fed. 520, 536, 537.)

"In the procedural aspect, the constitutional provision guarantees to every person his day in court and reasonable opportunity to be heard or defend." (*Rosenblum* v. *Rosenblum*, 42 N. Y. S. 2nd, 626, 630.)

In *Geary* v. *Kansas City, O. & S. R. Co.*, 39 S. W. 774, 138 Mo. 251, a State statute to the effect that the continuance of a trial because of the absence of a witness when the adverse party will admit that the witness would swear as stated in the affidavit, was held constitutional and not a violation of due process, thus indicating that where the adverse party does not stipulate and the continuance is refused, the denial of the continuance would violate the due process clause.

There is inherent in Rule 10 of the District Court the proposition that where an affidavit is submitted, and the adverse party will not admit that the witness would so testify, that a reasonable opportunity be given to the party submitting the affidavit to produce the required testimony. To close the hearing upon the refusal of the adverse party to concede the witness would testify as stated in his affidavit, and refuse to permit further testimony on behalf of the party who submitted the affidavit, is a violation of due process of law.

CONCLUSION.

Upon the grounds assigned, the petition for writ of certiorari should be granted.

Respectfully submitted,

EMANUEL HARRIS,
Counsel for Petitioners.

Supreme Court
OF THE UNITED STATES

IN THE

OCTOBER TERM—1946

No. 1002

D. M. W. CONTRACTING CO., INC., HARTFORD ACCIDENT and INDEMNITY COMPANY and AETNA CASUALTY and SURETY Co.,

Petitioners,

—*vs.*—

C. R. STOLZ,

Respondent.

REPLY BRIEF OF PETITIONERS

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—vs.—

C. R. STOLZ,

Respondent.

REPLY BRIEF OF PETITIONERS

Petitioners' References to the Record.

Respondent states in his brief (p. 2) that petitioners' statement of matters involved is inaccurate and that petitioners cite from their exceptions to the Auditor's Report as "a substitute for the actual record." The citations are from the record as certified by the Court below. The record refers to the transcript, but such transcript was not before the Court below. In the footnote on page 2 of his brief respondent objects to the statement on page 3 of the petition that respondent's counsel verified that Woolin (President of D. M. W.) was unable to testify. The petition cites page 91 of the record as the basis for such statement. Page 91 of the record contains such statement and refers to the transcript (pp. 185, 186) as the source for the state-

ment. Again, respondent objects (p. 2) to the statement on page 4 in the petition that the District Judge directed respondent's counsel, if he were not satisfied with Woolin's sworn statement, to propound interrogatories. The petition refers to page 92 of the record where such fact appears.

The record in the Court below and now before this Court was the joint appendix filed after designation and agreement by counsel for both petitioners and respondent. The statement in respondent's brief that the references in the petition are not the actual record is therefore without basis.

It is said that in the footnote on page 2 of respondent's brief petitioners omit relevant portions of the record. Respondent fails to state what relevant portions were omitted. The footnote is concluded with the statement that "on the basis of the present record, however, petitioners' attempt to color the statement of facts is of no great moment." In view of the last statement, and the failure of respondent to show any inaccuracy or omission in a single instance, respondent's statement that the petition is inaccurate in its citations from the record should be completely disregarded.

Petitioners' Were Not Afforded a Reasonable Opportunity to Present Evidence.

It is stated in respondent's brief (pp. 3 and 4) that "every reasonable opportunity was afforded petitioners to adduce proof", that "petitioners had ample opportunity, at every stage of the case to produce and offer relevant and competent evidence", that "not once did petitioners ever avail themselves of such opportunity", "indeed, no request was ever made by them to present any evidence", and that "petitioners refused to produce evidence by the personal appearance of their witnesses or through the use of their depositions."

In answer to the above statements, we submit the following chronology of facts from the record:

(1) On February 15, 1945 pursuant to the order of the District Court, petitioners filed Woolin's sworn statement with the auditor (Rec. 92).

(2) Respondent's counsel stated he would go through the statement and indicate what he would agree *Woolin would testify to,* and what he would object to and that he (respondent's counsel) could agree on the matter and then submit it to the auditor for consideration (93).

(3) The Auditor indicated that if respondent refused to stipulate *to what Woolin would testify,* he would either give consideration in his report to the facts stated in Woolin's affidavit *as evidence,* or he would consider the affidavit of Woolin as grounds for granting a continuance and granting a reasonable time to petitioners to submit evidence (90).

(4) The Auditor then adjourned the hearing to February 21, 1945, when respondent's counsel stated that he refused to stipulate to any part of Woolin's statement and refused to proceed by interrogatories (93).

(6) The Auditor then requested the parties to file briefs on the questions as to whether any of the facts stated in Woolin's affidavit might be considered *as evidence,* and as to whether the affidavit was sufficient for the granting of a continuance *for the purpose of permitting either side to submit additional evidence* (90).

(7) Such briefs were submitted (90).

(8) The Auditor died before ruling thereon (90).

(9) The successor Auditor applied to the District Court for instructions (27-28).

(10) Over the objection of petitioners (116) the District Court entered an order denying a further continuance to petitioners, directing that the hearings be concluded and directing the successor Auditor to file his report based on the deceased Auditor (28-29).

(11) The successor Auditor filed his report based on such existing record (39).

(12) The District Court thereupon entered judgment on the report of the successor Auditor, *reciting that petitioners had had every reasonable opportunity to produce competent evidence and had failed to do so* (96-97).

We submit that the above facts show that petitioners were misled into relying on respondent's agreement to stipulate as to the testimony of petitioners' witness, or that they would be given a further opportunity to present evidence in person or by deposition. The District Court by its order directing that the hearing be closed on the evidence submitted only by respondent, deprived petitioners of an opportunity to present any evidence.

The Authorities Cited in Respondent's Brief Do Not Support the Contention of Respondent That It Was Not Necessary for the Auditor Who Made the Report on the Evidence to See and Hear the Witnesses.

In the case of *Louisiana* v. *Mississippi*, 282 U. S. 458, quoted by respondent (p. 5), which was an action to establish part of an interstate boundary, *the testimony of both sides* was taken before a commissioner and then referred to a special master to report his findings of fact,

conclusions of law and recommendations for a decree. *No question was raised in that case with respect to the master's report on the testimony taken before the commissioner, as having been made by a master who had not heard or seen the witnesses* and the sole exceptions taken were as to the correctness of the master's findings and conclusions.

The case of *In re Wray,* 233 Fed. 418, cited by respondent (p. 5), was an appeal from the disallowance by a referee of a claim in bankruptcy. The referee died after he entered an order disallowing the claim, but before he had perfected his findings. The District Judge then made an order directing the successor of the deceased referee to certify the entire proceeding, together with the testimony and the exhibits to the District Court, *where the case was tried de novo.*

The case of *O'Grady* v. *Chautauqua Builders Supply Co.,* 33F (2d) 957, cited by respondent (p. 5), is discussed in petitioners' brief (p. 19). In that case, the parties stipulated to the reference to a referee in bankruptcy as a Special Master; the referee died after taking the testimony, but before rendering a decision. Subsequently a hearing *de novo* was had before the Court on the testimony taken before the master, apparently without objection to the procedure.

The case of *Amundson* v. *Clos.,* 271 Ill. 209, 110 N. E. 914, cited by respondent (p. 5), was an action for the registration of title, which was referred to a title examiner to report the substance of the proof and his conclusions thereon. The examiner took the evidence offered by both parties, but died before making any conclusions or filing his report. By order of the Court, the evidence certified by the examiner was filed in court and the cause was heard on such evidence *and any other evidence which any party desired to offer.* It was held in that case that the cause was prop-

erly heard by the Court on the evidence taken before the examiner, *with liberty to the parties to offer any evidence they saw fit.*

The case of *Coel v. Glos*, 232 Ill. 142, 83 N. E. 529, cited by respondent (p. 5) is directly contrary to the contention of respondent and is cited and quoted at length by petitioners in their brief (p. 16) as authority for the proposition that parties are entitled to have the master, who is to form his conclusions as to the facts, hear the testimony of witnesses, and that when the term of a master expires, all proceedings before him come to an end, and that the Court is without authority to again refer the case to another master to report his conclusions as to the issues by reading the testimony taken before the first master.

The Reference to the Successor Auditor Was in Violation of Section 16-1718 of the District of Columbia Code.

It is stated in respondent's brief (p. 6) that Section 16-1718 of the District of Columbia Code applies only to a "special type of consent references". The Court below held that there was no merit to the issue as to compulsory and consent references in view of Rule 53 of the Federal Rules of Court Procedure which makes a distinction only between jury and non-jury actions (116).

Chapter 17 of the District of Columbia Code (Sections 16-1701 to 16-1719) deals with references of questions of law and fact in causes at common law, admiralty or equity and provides for consent references in such causes. Rule 53 superseded Section 16-1701 of the Code insofar as such references may be ordered on consent. However, Rule 53 makes no provision as to the procedure in the event of the death of the referee. In such case, Section 16-1718 which provides that upon the death of a referee, the Court may appoint a successor referee, *upon consent of the parties*, remains in full force and effect, unaffected by Rule 53.

Shima v. *Brown,* 133 F. (2d) 48, cert. den. 318 U. S. 787.

The District Court was therefore without authority to order the reference to the successor auditor, over the objection of petitioners (28-29).

The case of *Ex parte Peterson,* 253 U. S. 300, cited by respondent (p. 6) on this point, has no bearing whatever on this situation. That case merely held that in a jury action, the Court may appoint a master to simplify and clarify the issues and to report thereon preliminary to a trial by jury, where a complicated and intricate account between the parties is involved.

The Reference to the Successor Auditor Was in Violation of Rule 53.

It is stated in respondent's brief (p. 7) that petitioners "now attempt to say that there were no longer complicated issues to be determined" and that the contention that there was no exceptional condition requiring a reference (as provided by Rule 53), is being raised here for the first time.

Respondent himself moved in the District Court to recall the case from reference to the first Auditor on the ground that when the cause was originally referred "there were complicated issues between the original plaintiff and defendant, which have been removed by settlement between those parties, *and there is no necessity for the case being continued before the Auditor*" (16).

The objection of petitioners to the order to the successor Auditor and their exceptions thereto were without limitation as to the grounds of such exception (29).

The Closing of the Hearing Without Affording Petitioners an Opportunity to Submit Evidence Was in Violation of Rule 10 of the District Court.

It is stated in respondent's brief (p. 7) that petitioners "misconceive the purpose of Rule 10 of the district court", and that if "a proper showing had been made to justify a continuance", "the court would have afforded opposing counsel an opportunity to stipulate to relevant testimony, otherwise a further continuance may have been granted." It is further stated (p. 7) that after the affidavit under Rule 10 was filed, "the trial court determined there had been no proper showing to warrant the court in granting any further continuance, and the case was ordered concluded."

The facts as to the submission of the affidavit under Rule 10 are fully set forth under point IV of petitioners' main brief, and on pages 3-4 of this brief and on pages 4-7 of the petition. Contrary to the statements in respondent's brief, the district court did give respondent an opportunity to stipulate, and respondent's counsel did first state that he would stipulate to portions of the affidavit as testimony of petitioners' witness, and then refused to stipulate to any portion of it. Without further change in the situation (except as to the death of the first Auditor), the district court ordered the hearing closed.

Rule 10 of the district court was violated in that notwithstanding the refusal of respondent to admit that petitioners' witness would testify to any of the facts stated in his affidavit, after the district court ordered that petitioners should file such affidavit, a continuance was nevertheless denied without further opportunity to submit evidence.

Petitioners Were Deprived of Their Property Without Due Process of Law.

It is stated in respondent's brief (p. 8) that petitioners' contention as to due process was not raised or argued below. The essentials of due process are jurisdiction, adequate notice and a fair hearing. In the procedural aspect, due process is the constitutional guarantee that every person have his day in court, and reasonable opportunity to be heard and defend. A proceeding strictly *ex parte* offends the Constitutional provision.

Throughout this proceeding, not only in the Court below, but in the District Court, petitioners have asserted that the report on which judgment was entered against them was "totally *ex parte*" (93, 96), that the successor auditor on whose report judgment was entered was without jurisdiction (93, 94), that it was "unjust and unfair" that the cause should be decided "*ex parte*" (93, 96) and that petitioners should be given a reasonable opportunity to present whatever evidence they could in defense (93, 96).

These contentions were fully set forth in the exceptions to the report of the successor Auditor and the motion to suppress it. Such exceptions and motion were considered and referred to by the Court below in its opinion (116).

The statement of respondent that the contention of absence of due process and violation of the Fifth Amendment was not raised or argued below is therefore contrary to the record. It was not necessary for petitioners to state *in haec verba* that due process was not observed or that the Fifth Amendment was violated. The petitioners having been denied a Court (or master) of proper jurisdiction, and having been denied a fair hearing and their day in court, and having had imposed on them a judgment based on a totally *ex parte* proceeding, their statement of such grievances, constituting the particulars and respects in which the constitutional guarantee was denied, was, in ef-

fect, a plea of denial of due process and violation of the Fifth Amendment. Surely, in such circumstances, petitioners should not be deprived of the benefit of the provisions of the constitution, because they did not use the words "due process" or "Fifth Amendment". Moreover, the failure to use such words should not deprive petitioners of a hearing of their grievances in this Court, if, in fact, as the record shows, petitioners were deprived of their property without due process of law and in violation of the Fifth Amendment.

CONCLUSION.

Petitioners submit that the writ of certiorari should be granted.

Respectfully submitted,

EMANUEL HARRIS,
Counsel for Petitioners.

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1946

No. 1002

D. M. W. CONTRACTING CO., INC., HARTFORD ACCIDENT AND INDEMNITY COMPANY AND AETNA CASUALTY AND SURETY CO.,
Petitioners,

v.

C. R. STOLZ, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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v.

C. R. STOLZ, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

C. R. Stolz, by his attorneys, answering the petition filed herein by D. M. W. Contracting Co., Inc., Hartford Accident and Indemnity Company and Aetna Casualty and Surety Co. for a writ of certiorari, respectfully represents as follows:

PRELIMINARY STATEMENT

Petitioners' "Statement of Matters Involved" is inaccurate and misleading in several respects.* Throughout petitioners' Statement liberal and profuse citations are made to their own Exceptions to Auditor's Report (76-94), as a substitute for the actual record.

However, for our purposes a fair and concise statement of the case may be found in the opinion of the Court of Appeals (115-117), which is based upon the pleadings and orders of the trial court (1-29), the report of the auditor (29-75), and the judgment of the trial court (96-97).

ARGUMENT

(1) This is a contract action. The opinion of the United States Court of Appeals for the District of Columbia clearly and distinctly sets forth the facts and the law in support of the conclusion reached, and there is no valid ground to support petitioners' application for review of the decision reached by the two lower courts other than the usual disappointment attending an adverse ruling.

(a) There is no federal question presented here, nor have the lower courts decided the case contrary to applicable decisions of this Court.

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* *For example:* At page 3 of the Petition it is stated that "Stolz' counsel verified by direct telephone to Woolin that he was unable to testify," which is directly contrary to fact and without basis in the record as such. On page 4 petitioners state "At the same time, the District Judge directed Stolz' counsel, if he were not satisfied with Woolin's sworn statement, to propound interrogatories to Woolin", which is without warrant in the record and contrary to the order of the trial court (23), since by that order the witness was to appear and testify if petitioners had so desired. At page 5 petitioners omit other relevant portions of the record, not a part of the transcript, to suit their own purposes. On the basis of the present record, however, petitioners' attempt to color the statement of facts is of no great moment.

(b) There is no conflict with decisions of other circuit courts of appeal; there is no important question of local law in conflict with applicable decisions; the decisions of the two lower courts are not in conflict with the weight of authority; there is present no important question of federal law which has not been, but should be settled by this Court; and there is no call for an exercise of this Court's power of supervision since no showing is made that the lower courts have departed from the accepted and usual course of judicial proceedings.

(c) There is no question of general importance, or any question of substance relating to the construction or application of the Constitution or any statute of the United States.

In short, there are no special or important reasons why this Court should grant a writ of certiorari here.

(2) This case was originally referred to the auditor of the district court who, we may assume, is a standing master under Rule 53 (a) of the Federal Rules of Civil Procedure. No special appointment was made; the reference was ordered on the court's own motion to which no objection was interposed by the parties.

Despite the delays caused by petitioners' actions below, the respondent's case was fully established before the auditor and the trial court, and every reasonable opportunity was afforded petitioners to adduce proof on their own behalf. Of importance to note is the fact, which affirmatively appears throughout the record, that petitioners had ample opportunity, at every stage of the case, to produce and offer relevant and competent testimony on their own behalf; *but, not once did petitioners ever avail themselves of such opportunity—indeed, no request was ever made by them to present any evidence—between the commencement of the hearings on October 17, 1944 and the date of the final judgment on December 19, 1945, a period of more than 14 months.*

The original order of reference was never objected to; the fact is that petitioners participated in the hearings without objection thereto, and it was only after the death of the first auditor, after the hearings had been concluded, that the thought perhaps occurred to petitioners that it would likely be feasible to institute objections on the chance that respondent would be compelled to start all over again, thus preventing a final determination for another considerable length of time. The trial court very properly refused to become a party to such dilatory tactics; especially since petitioners refused to produce evidence by the personal appearance of their witnesses or through the use of their depositions.

It matters not, therefore, whether the officer who reported the evidence heard or saw the witnesses, since **(a)** the issues were neither controverted nor disputed, **(b)** the petitioners failed to offer evidence available to them, and **(c)** the trial court, before whom the case always remained, gave careful consideration to the entire proceedings and evidence, and heard the case anew, upon the record and proceedings so made, before arriving at its own independent conclusion and judgment. (*Smith v. Brown,* (CCA 5, 1925) 3 F (2d) 926).

The cases cited by petitioners in support of their arguments are either inapplicable or clearly distinguishable, and it would serve no useful purpose to review those authorities here, since the matters argued by them in their Points I, II and IV were carefully considered and reviewed by the two lower courts.

(3) Petitioners' arguments in connection with the trial court's instructions to the successor auditor were all presented to the lower courts. The query seems to be this: Was the lower court required to compel respondent again to present his case and evidence, merely that the auditor might re-state and file another report on respondent's uncontradicted and undisputed testimony? No practical

or logical reasons are advanced by petitioners to support their position. In either event it is the court (who neither sees the witnesses nor hears the testimony) making the final determination. Where the evidence in a particular case is sharply conflicting and the master must consider the testimony in the light of his observations of the witnesses, their bearing and demeanor on the stand in order to weigh and resolve doubts as to the credibility of witnesses, perhaps it might be preferred that the auditor should see and hear the witnesses. However, even in such cases this Court has held that a master is not required to see and hear witnesses himself, but if he does not the court must carefully scrutinize and examine his report. See: *Louisiana v. Mississippi* (282 U. S. 458, 465; 75 L. Ed. 459), involving much conflicting testimony, where this Court stated:

> "Mindful of the fact that the special master did not see and hear the witnesses, we have felt it incumbent upon us to study the proofs, documentary and oral, to examine the deductions made therefrom, and thereby to test the stated conclusions. The preponderance of the evidence supports the master's findings. * * *"

In the instant case the trial court carefully examined and studied the entire case arriving at the same conclusions as the auditor; and its decision has been affirmed by the court of appeals. The applicable authorities all support the action of the trial and appellate court.

In re Wray, 233 Fed. 418
O'Grady v. Chautauqua Builders Supply Co., 33 F (2d) 957

Amundson v. Clos, 271 Ill. 209; 110 N. E. 914
Coel v. Glos, 232 Ill. 142; 83 N. E. 529

There is no need to place any strained or confused construction upon Rule 52 of the Federal Rules of Civil Procedure, as petitioners attempt to do. The following language of the court of appeals is clear:

"It appears from the foregoing that it is the trial court in such a case who makes the final determination of all the issues. The report of the master is advisory only and is without effect until confirmed by the court. For while he is charged with accepting the master's findings of fact unless clearly erroneous, it is necessary for him to review the transcript of the proceedings to determine if such error has been made, and when objection is taken to the report, as was done here, he is bound to review the transcript of the proceedings, evidence and exhibits to determine for himself whether the master's report should be accepted, rejected wholly or partly, modified, recommitted with instructions, or whether he should receive further evidence. And in no instance is he bound by the master's conclusions of law. The effect is the same whether or not the parties consented to the reference." (117)

(4) The provisions of Section 16-1718 of the District of Columbia Code (1940) were called to the attention of the two lower courts. Petitioners continue to misconceive the function and purport of that code section. It has to do solely with the special type of *consent* reference in the nature of award proceedings, which clearly never had any bearing to this situation. (Cf. *Ex Parte Peterson*, 253 U. S. 300; 64 L. Ed. 919). The original order of reference was made by the court, and was never objected to by petitioners. It was a reference under the Federal Rules of Civil Procedure. Subsequently, and after the death of the first auditor, the court directed his successor to file an advisory report on the basis of the record already made. This was done, and upon review the court arrived at its independent conclusions, confirming the report of the auditor. Petitioners have no cause to complain. They were allowed their full day in court.

(5) Petitioners' belated attempt to raise some question about the propriety of the trial court's order instructiong the successor auditor to file an advisory report based upon the evidence taken and reported is likewise without

merit. They now claim that "There was no exceptional condition requiring a reference at the time the District Court directed the reference to the second Auditor. . . ." They raised no such question or objection when respondent moved to close the hearings or, in the alternative, to recall the case from the auditor (16), but now attempt to say that there were no longer complicated issues to be determined. They completely overlook the fact that the case had been heard, upon oral and documentary evidence; that they never offered any testimony; and that the only thing remaining was the filing of a report based upon the record already made. Moreover, this point of contention is being raised here for the first time. Petitioners never previously complained of the so-called reference to the successor auditor on this ground. It is entirely lacking in merit.

(6) Petitioners misconceive the purpose of Rule 10 of the district court. That rule simply stated is one by which the trial court may determine, in its sound discretion, whether a proper showing has been made to justify a continuance and, if such had been the case, the court would have afforded opposing counsel an opportunity to stipulate to relevant testimony, otherwise a further continuance may have been granted. That affidavit which petitioners submitted is not a part of the record here. However, it was highly objectionable not only to respondent but to the court as well. The point is that, after this affidavit was filed, the trial court determined there had been no proper showing to warrant the court in granting any further continuance, and the case was ordered concluded. Apparently petitioners indirectly are complaining about the refusal of the trial court to order any such further continuance; but, as stated by the District Court of Appeals (116):

> "The case was continued from time to time until the appellee (respondent here) showed to the court's

> satisfaction that the D.M.W.'s witness's failure to appear was due to an unwillingness to testify rather than to an inability, whereupon the court ordered the auditor to conclude the cause."

Petitioners are hardly in a position to complain of their own dereliction.

(7) Petitioners' argument that they have been deprived of property without due process and in violation of the Fifth Amendment is without foundation. This contention was not raised or argued below. Moreover, this litigation extended for a period of 19 months before the trial court; petitioners were represented by resourceful counsel at every step; they had full notice and every opportunity to be heard throughout the proceedings; they have quite throughly litigated the issue, with adverse results; and they have suggested no reason for further review.

CONCLUSION

This case can hardly be of any special importance to any one other than the immediate parties. Petitioners had ample opportunity to present their views to the lower courts, both in briefs and oral arguments, and careful consideration was given to all points properly presented. Both courts have ruled against petitioners who, by their dilatory tactics, have been successful in depriving respondent of the fruits of his labor for more than five years. It is time this litigation was drawn to a final close.

It is respectfully submitted that the petition for writ of certiorari presents no sound reason for the exercise of this Court's plenary power, and the petition should be denied.

Respectfully submitted,

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